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June 27, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

**Re: Joint Comments of the ABC, CBS, Fox, and NBC Television
Network Affiliate Associations, ET Docket No. 00-90**

Dear Ms. Salas:

Enclosed please find the original and nine copies of the Joint Comments of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations in the above-referenced docket.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with the undersigned.

Sincerely,


David Kushner

Enclosures

cc: International Transcription Services (w/enc.)

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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Technical Standards for Determining
Eligibility for Satellite-Delivered Network
Signals Pursuant to the Satellite Home
Viewer Improvement Act

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)

ET Docket No. 00-90

To: The Commission

**JOINT COMMENTS OF THE
ABC, CBS, FOX, AND NBC
TELEVISION NETWORK AFFILIATE ASSOCIATIONS**

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Summary

In reporting to Congress on the Grade B signal intensity standard for purposes of SHVIA, the Commission must make recommendations in a manner consistent with the purpose and intent of Congress when it passed the Act. Accordingly, the Commission must remember: (1) that localism is a core policy objective underlying SHVIA's compulsory copyright license and (2) that a compulsory license is in derogation of exclusive property rights and, therefore, must be construed as narrowly as possible.

In light of these principles, there is no reason for the Commission to recommend any changes to its well-established, longstanding, and time-tested Grade B standard. The Commission has carefully examined the adequacy of its Grade B standard on numerous occasions, and *every* time it has concluded that *no* alternation is warranted. In fact, just last year the Commission reaffirmed its current Grade B standard specifically for use in determining whether a household is "unserved" under the Satellite Home Viewer Act. It would be foolhardy for the Commission now to recommend changes to a standard that has been exhaustively reviewed and consistently upheld.

Very few U.S. households qualify for the compulsory copyright license set forth in SHVIA. The number of "white area" households has decreased substantially due to an increase in the number of television stations and improvements in transmission and receiver technology. In addition, the passage of local-into-local legislation has changed the nature of the "white area" problem. Those markets where local-into-local service is available from at least one satellite carrier do not contain any truly "unserved households" because households that can receive local signals via satellite obviously do not need "life-line network television service."

There is no scientifically sound evidence that viewer expectations of picture quality with respect to free, analog, over-the-air signals have changed since the Commission adopted its Grade B signal intensity standard. Accordingly, any argument that viewers are dissatisfied with the quality of a Grade B strength signal is pure conjecture. No recent study documents any purported change

in viewer expectations or replicates the methodology of the initial TASO study. The Commission should be careful not to conflate viewer expectations regarding the picture quality of a pay television service such as satellite or cable with expectations regarding the quality of a free, analog, over-the-air signal. Consumers who pay for television service should expect to receive a picture quality that is better than what they receive for free. For that reason and others, studies such as the Jones study cited in the *Notice* are irrelevant to any determination of whether to recommend modifications to the Grade B standard.

By adding the word “stationary” to the “unserved household” definition, Congress did not change the methodology by which signal intensity at any given household should be measured. It has always been assumed that in measuring signal intensity, the receiving antenna must be properly oriented, and it is abundantly clear from SHVIA’s legislative history that Congress did not intend to alter this presumption.

There is no need for the Commission to modify any of the planning factors used in calculating the Grade B signal intensity values. In fact, if the Grade B signal intensity values are to be revised at all, they should be adjusted downward, not upward. Moreover, there is no need for the Commission to attempt to account for ghosting in defining Grade B signal intensity. Ghosting is a complex phenomenon that is difficult to predict and, in any event, technological solutions exist that can negate this problem.

Finally, it is not appropriate at this time for the Commission to make any recommendation regarding a Grade B standard for DTV. Because the transition from analog to digital transmission of programming will not take place until the year 2006 at the earliest, any recommendation at this time would be premature.

Network Affiliates urge the Commission to recommend to Congress that no changes be made to its longstanding Grade B signal intensity standard for purposes of SHVIA.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Technical Standards for Determining)	ET Docket No. 00-90
Eligibility For Satellite-Delivered Network)	
Signals Pursuant to the Satellite Home)	
Viewer Improvement Act)	

To: The Commission

**JOINT COMMENTS OF THE
ABC, CBS, FOX, AND NBC
TELEVISION NETWORK AFFILIATE ASSOCIATIONS**

**I.
Preliminary Statement**

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the Fox Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Network Affiliates"), by their attorneys, hereby submit these comments in response to the Commission's *Notice of Inquiry* ("*Notice*"), FCC 00-184, released May 26, 2000, in the above-captioned proceeding. The Network Affiliates represent more than 800 local television broadcast stations throughout the nation that are affiliated with one of the four major television broadcast networks.

The Network Affiliates urge the Commission to recommend to Congress that no changes be made to its longstanding Grade B signal intensity standard for purposes of the Satellite Home Viewer Improvement Act.

II. The Commission Must Keep The Intent And Purpose Of SHVIA In Mind

The Satellite Home Viewer Improvement Act ("SHVIA" or "Act") was enacted by Congress in 1999 to replace the Satellite Home Viewer Act ("SHVA"), originally enacted in 1988 and set to expire last year.¹ While SHVIA added new sections to the existing SHVA, most notably a local-into-local compulsory license for satellite carriers,² the Section 119 compulsory license provision, which allows satellite carriers to retransmit distant network programming to "unserved households," was reenacted basically unchanged.³ The Conference Report accompanying passage of SHVIA notes that "the Section 119 regime is largely being extended in its current form."⁴ Thus, much of the information submitted in the Commission's prior SHVA rulemaking proceeding in CS Docket No. 98-201 is relevant here. Before making any recommendations to Congress, the Network Affiliates urge the Commission to review and consider the voluminous research and materials filed by both the Network Affiliates and the National Association of Broadcasters ("NAB") in that proceeding.⁵

¹ Consolidated Appropriations Act for 2000, Pub. L. No. 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999, Title 1 of the Intellectual Property and Communications Omnibus Reform Act of 1999, relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in Titles 17 and 47 U.S.C.).

² See 17 U.S.C. § 122.

³ See 17 U.S.C. § 119.

⁴ Conference Report on H.R. 1554, Intellectual Property and Communications Omnibus Reform Act of 1999, 145 CONG. REC. H11793 (daily ed. Nov. 9, 1999) (hereinafter "Conference Report").

⁵ See Joint Comments of the ABC, CBS, Fox, and NBC Television Network Affiliate
(continued...)

Section 119 was enacted for two reasons: (1) to enable households located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite and (2) to protect the integrity of the copyrights that make possible the existing, free, over-the-air national network/local affiliate broadcast distribution system.⁶ Section 119 represents a careful balance between, on the one hand, the public interest in allowing those few households located in "white areas" beyond the reach of a local network station to secure access to broadcast network programming and, on the other hand, the public interest in preserving "localism" by protecting the copyright each local network affiliate has for the broadcast of its network programming in its local market.

Section 119 provides a compulsory license for satellite carriers to retransmit distant network programming to those households that are "unserved." As the Conference Report states:

[T]he specific goal of the Section 119 license is to allow for a *life-line network television service* to those homes which cannot receive the local network television stations. Hence, the unserved household limitation that has been in the license since its inception.⁷

⁵(...continued)

Associations, CS Docket No. 98-201 (filed Dec. 11, 1998); Joint Reply Comments of the ABC, CBS, Fox, and NBC Affiliate Associations, CS Docket No. 98-201 (filed Dec. 21, 1998); Supplemental Information of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations, CS Docket No. 98-201 (filed Jan. 15, 1999); Comments of the NAB, CS Docket No. 98-201 (filed Dec. 11, 1998); Reply Comments of the NAB, CS Docket No. 98-201 (filed Dec. 21, 1998). Network Affiliates hereby incorporate by reference their prior filings in CS Docket No. 98-201.

⁶ See *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, Report and Order*, FCC 99-14, 14 Comm. Reg. (P & F) 1193 (1999), at ¶ 12.

⁷ Conference Report, 145 CONG. REC. H11792-H11793 (emphasis added).

A household is “unserved” under SHVIA if, *inter alia*, it

cannot receive, through the use of a conventional, stationary, outdoor, rooftop receiving antenna, an over-the-air signal of a primary network station affiliated with that network of Grade B intensity as defined by the Federal Communications Commission under Section 73.683(a) of Title 47 of the Code of Federal Regulations, as in effect on January 1, 1999.⁸

In this proceeding, the Commission seeks comment on whether it should recommend to Congress changes to the definition of “Grade B intensity” as that term is used in SHVIA. It is axiomatic that any recommended changes to SHVIA must be consistent with the purpose and intent of Congress when it passed the Act. Thus, the Grade B standard cannot be modified in a way that is inconsistent with the protection of localism, a fundamental tenet of SHVIA. In addition, consistent with congressional intent, the compulsory license granted by Section 119 must be narrowly construed.

A. First And Foremost, The FCC Must Protect Localism

In deciding whether to modify the Grade B signal intensity standard for purposes of SHVIA, the Commission cannot act in a way that would jeopardize or undermine the strength of the nation’s system of free, over-the-air television. Localism is a core policy objective underlying the creation of the Section 119 compulsory license. The Commission has previously recognized that

[t]he network station compulsory licenses created by the Satellite Home Viewer Act are limited because Congress recognized the importance that the network-affiliate relationship plays in delivering free, over-the-air broadcasts to American families, and because of the value of localism in broadcasting. Localism, a principle underlying the broadcast service since the Radio Act of 1927, serves the public

⁸ 17 U.S.C. § 119(d)(10)(A).

interest by making available to local citizens information of interest to the local community (e.g., local news, information on local weather, and information on community events). Congress was concerned that without copyright protection, the economic viability of local stations, specifically those affiliated with national broadcast networks, might be jeopardized, thus undermining one important source of local information.⁹

When Congress passed SHVIA, it specifically reiterated its intention to promote the concept of localism. As the Conference Report accompanying SHVIA states:

[T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism. It is well recognized that television broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities. *To that end the Committee has structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of local television broadcast stations to subscribers who reside in local markets of those stations.*¹⁰

Accordingly, any actions taken by the Commission in this proceeding must be designed to protect and encourage local broadcasting.

B. SHVIA's Compulsory Copyright License Must Be Narrowly Construed

In addition to remembering the overarching principle of localism, the Commission must also keep in mind that a compulsory license is in derogation of property rights and, therefore, must be

⁹ Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, *Notice of Proposed Rule Making*, FCC 98-302, 14 Comm. Reg. (P & F) 2163 (1998), at ¶ 3.

¹⁰ Conference Report, 145 CONG. REC. H11792 (emphasis added).

narrowly construed.¹¹ Section 119 of SHVIA gives satellite carriers an extraordinary privilege—a compulsory copyright license that allows satellite carriers to uplink a distant network television station and retransmit the station’s programming to “unserved households” without purchasing in the open market the underlying copyrights for the station’s programming.¹²

Congress has recognized that allowing satellite carriers to retransmit distant network programming into a local affiliate’s market is a violation of a local station’s exclusive copyright privileges. As the Conference Report notes, “allowing the importation of distant or out-of-market network stations in derogation of the local station’s exclusive right—bought and paid for in market negotiated arrangements—to show the works in question, undermines those arrangements.”¹³ Congress, therefore, intended that the scope of this extraordinary privilege be extremely narrow. As the Conference Report recognized:

[P]erhaps most importantly, the Conference Committee is aware that in creating compulsory licenses, it is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright

¹¹ See *Fame Publishing Co., Inc. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975) (“[T]he compulsory license provision is a limited exception to the copyright holder’s exclusive right to decide who shall make use of his composition. As such, it must be construed narrowly, lest the exception destroy, rather than prove, the rule.”).

¹² The Copyright Office has made clear that “the copyright law does not prohibit a satellite carrier from providing network service to a subscriber who does not reside in an unserved household. Rather, the satellite carrier simply cannot make use of the compulsory license in this circumstance, and must negotiate privately with the copyright owners of the programming appearing on the network signals being retransmitted.” U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmissions of Broadcast Signals* (Aug. 1, 1997), at 13.

¹³ Conference Report, 145 CONG. REC. H11792.

holders, and that it therefore *needs to act as narrowly as possible* to minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate.¹⁴

III.

There Is No Pressing Reason For The Commission To Recommend Changes To Its Longstanding Grade B Standard

There is no reason for the Commission to recommend any changes to its well-established, longstanding, and time-tested Grade B standard. The Commission has carefully examined this standard numerous times in the past and has always reaffirmed its fundamental accuracy, and there is no evidence of any need to revise this standard now. As shown below, very few "unserved households" remain in the United States, and the so-called "white area" problem has been fundamentally altered due to the advent of local-into-local satellite service. Despite unfounded speculation to the contrary, there is no reliable evidence that viewers' expectations of the picture quality of a free, analog, over-the-air signal have changed such that the Commission needs to redefine the Grade B standard. Moreover, Congress did not change the methodology for measuring signal strength when it added the word "stationary" to the "unserved household" definition. It is clear from the Act's legislative history that by adding this word Congress did not intend to suggest that receiving antennas should not be properly oriented. Finally, as demonstrated in the attached Engineering Statement prepared by IIT Research Institute, Center for Electromagnetic Science, the Grade B standard continues to be an accurate and objective measure of whether a household can receive a local station over-the-air.

¹⁴ *Id.* (emphasis added).

**A. The Grade B Standard Has Been Repeatedly Reviewed And Reaffirmed
By The Commission And Should Not Be Changed**

The Commission has carefully examined the adequacy of its Grade B standard on numerous occasions and, every time that the Commission or its staff has reviewed the values or considered their revision, the Commission has concluded that *no* alteration in the overall values established in 1952 is warranted. In fact, in 1975, when the Commission considered redefining Grade B signal strengths for NTSC purposes, it proposed *lowering—not raising—the* field strength values, although ultimately it did not act.¹⁵

In 1977, the Office of Chief Engineer, as a result of issues raised concerning VHF “drop-ins,” reviewed the planning factors for VHF and ultimately determined that certain median field strength values warranted a *reduction—not an increase*. The Office concluded that the required median field strength for low VHF should be 44 dBu for Zone I and 45 dBu for Zones II and III, a *reduction* of 3 or 2 dB, and for high VHF should be 54 dBu for Zone I and 56 dBu for Zones II and III, a *reduction* in the former instance of 2 dB.¹⁶ No Commission revision was undertaken as a result of this review.

¹⁵ See Television and FM Field Strength Curves, *Report and Order*, FCC 75-636, 34 Rad. Reg. 2d (P & F) 361 (1975), ¶ 46 (discussing proposal to lower Grade B field strength values because “equipment refinements occurring since the original Grade B determinations were made” justified “a reduction in estimated receiver noise figures, an upward revision in values for receiving antenna gain, and a reduction in the assessed effect of transmission line losses”). The Commission ultimately did not adopt the new parameters because there was no “urgent need, from an engineering standpoint, to redefine the Grade B contour, and since other considerations d[id] not make such a course of action expedient.” *Id.* at ¶ 49.

¹⁶ See Gary S. Kalagian, *A Review of the Technical Planning Factors for VHF Television Service*, FCC/OCE Bulletin RS 77-01 (Office of Chief Engineer Mar. 1, 1977), at 9 (Table 4B, line 21).

In 1980, the UHF Comparability Task Force proposed that the Grade B values for low VHF and high VHF remain unchanged but that the Grade B field strength value for UHF be increased by 7 dB to 71 dBu.¹⁷ That change was due principally to a 5 dB increase in the time fading factor. No Commission revision was undertaken as a result of this review.

In 1997, as the culmination of the extensive DTV proceedings, the Commission decided to premise DTV service areas on a *replication* of existing NTSC Grade B service areas. The Commission expressly sought, first, to provide DTV coverage comparable to a station's current coverage area and, second, to provide the best correspondence between the size and shape of the proposed DTV channel's coverage area and the station's existing coverage.¹⁸ Maintaining viewer "access to the stations that *they can now receive over-the-air*" was a critical component of the DTV replication scheme.¹⁹ The Commission, therefore, expressly *reaffirmed* its longstanding Grade B values.²⁰ It is ludicrous to suggest that the Commission would have predicated DTV—for which broadcasters are investing millions and millions of dollars—on the existing definition of Grade B

¹⁷ See Philip B. Gieseler et al., *Comparability for UHF Television: Final Report* (Office of Plans and Policy Sept. 1980), at 252 (Table B-2). The Task Force expressly stated the limitations of its review: "The revised planning factors are suggested for the limited purpose of comparing the coverage of UHF and VHF stations, and any further use, such as incorporation of these contours into FCC rules, would require significant additional technical and policy investigation." *Id.* at 250. In fact, the Task Force contemplated that "[a]s various improvements to the UHF service are made, the particular modified contours suggested here may no longer be appropriate." *Id.* at 250 n.4.

¹⁸ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Sixth Report and Order*, FCC 97-115, 7 Comm. Reg. (P & F) 994 (1997), at ¶ 12.

¹⁹ *Id.* at ¶ 29 (emphasis added).

²⁰ Cf. Longley-Rice Methodology for Evaluating TV Coverage and Interference, OET Bulletin No. 69 (FCC July 2, 1997), at 2 (Table 1) (showing the *current* field strength values as defining the area subject to calculation for analog stations in the DTV context).

service if that service were not, in fact, adequate.

Finally, just last year, the Commission issued a *Report and Order* affirming its current Grade B standard specifically for use in determining whether a household is "unserved" under SHVA.²¹ In that proceeding, the Commission considered whether changes in technology, environmental noise, or viewer expectations warranted a modification of the Grade B definition.²² After considering copious amounts of information filed by the numerous parties to that proceeding, the Commission declined to modify its longstanding Grade B values. The Commission stated that there was no reliable evidence demonstrating that consumer picture quality expectations had changed²³ and that any increases in environmental noise since the 1950s likely were negated by improvements in receiver and antenna technology.²⁴ The Commission concluded that "the record in this proceeding provides an inadequate basis for changing the Grade B signal intensity values either generally or for purposes of the SHVA specifically."²⁵

Therefore, the Commission has carefully examined the adequacy of its Grade B standard on numerous occasions. Each examination was conducted with the view to furthering the aims and benefits of television service. Each time, including as recently as just last year, the Commission determined that no change was necessary. It would be foolhardy for the Commission now to

²¹ Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, *Report and Order*, FCC 99-14, 14 Comm. Reg. (P & F) 1193 (1999), at ¶ 42.

²² *Id.* at ¶ 42.

²³ *Id.* at ¶ 40.

²⁴ *Id.* at ¶ 41.

²⁵ *Id.* at ¶ 42.

recommend changes to a standard that has been exhaustively reviewed and consistently upheld.

B. There Are Very Few Truly Unserved Households

It is clear from the legislative histories of both SHVIA and its predecessor SHVA that Congress, the Copyright Office, the satellite industry, and this Commission believed that the special copyright privilege afforded to satellite carriers would result in the provision of distant network signals via satellite to only a *small number* of households. A House Report issued more than ten years ago, which accompanied the original SHVA, noted that only a "*small percentage* of television households cannot now receive a clear signal of the . . . national television networks."²⁶ The Honorable Ralph Oman, the then Register of Copyrights, noted that only a "relatively *small number* of viewers would qualify under the Act for satellite delivery of [distant] network programming."²⁷ In 1987, over-the-air network penetration was 98.1% of all television households, and the Commission estimated then that fewer than 500,000 households would qualify for SHVA's compulsory license—a number the Commission termed "not substantial upon a nationwide basis."²⁸

Already "not substantial" in 1987, the "white area" problem has steadily diminished in the past thirteen years. The number of commercial television stations serving the nation has increase by some 21% since 1987. There were 1028 commercial television stations on the air in 1988; today

²⁶ H.R. Rep. No. 100-887, pt. 2 at 19 (1988) (emphasis added).

²⁷ *Hearing Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary*, 100th Cong. (Jan. 27, 1988) (statement of Ralph Oman) (emphasis added).

²⁸ *Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, Report*, FCC 87-62, 62 Rad. Reg. 2d (P & F) 687 (1987), at ¶ 198.

there are 1243²⁹. Moreover, television transmitters, receivers, and antennas have continued to improve. Television receivers can pick up an acceptable quality picture today at greater distances from transmitter sites than ever before. While the number of U.S. households continues to increase, the coverage of local stations has as well. Given the increase in the number of stations and translators and improvements in television transmitting and receiving equipment, Network Affiliates believe "white area" reception difficulties are likely to be experienced by fewer than 0.5% of all television households.

C. The Passage Of Local-Into-Local Legislation For Satellite Has Transformed The White Area Problem

The passage of local-into-local legislation for the satellite industry has changed the nature of the white area problem. As a result of local-into-local legislation, satellite carriers are permitted to make local stations available to any household located in the United States.³⁰ EchoStar and DirecTV, the nation's largest satellite carriers, currently offer local network signals to their subscribers in 28 television markets, covering more than half of the nation's population.³¹ These

²⁹ See 66 Television and Cable Factbook at I-45 (1998); *Broadcast Station Totals as of September 30, 1999* (released Nov. 22, 1999).

³⁰ See 17 U.S.C. § 122.

³¹ These markets, in alphabetical order are: Atlanta, Boston, Charlotte, Chicago, Cleveland, Dallas-Ft. Worth, Denver, Detroit, Houston, Indianapolis, Kansas City, Los Angeles, Miami-Ft. Lauderdale, Minneapolis-St. Paul, Nashville, New York, Orlando, Philadelphia, Phoenix, Pittsburgh, Portland, Sacramento-Stockton-Modesto, Salt Lake City, San Francisco-Oakland-San Jose, Seattle-Tacoma, St. Louis, Tampa-St. Petersburg-Sarasota, Washington (D.C.). See *DIRECTV: Local Channels Are Now Available!* (visited June 26, 2000) <<http://www.directv.com/howtoget/howtogetpages/0,1076,224,00.html>>; *Local Broadcast Networks* (visited June 26, 2000) <http://www.dishnetwork.com/software/third_level_content/locals/> (continued...)

local signals are offered throughout the entire DMA, so all households located in these markets can receive local network programming via satellite.

Even though households located in these markets technically may be “unserved” under SHVIA, they cannot be considered unserved consistent with the intent of the Act. Congress specifically provided that the Section 119 compulsory license was intended only “to allow for a *life-line network television service* to those homes . . . which cannot receive the local network stations.”³² A household that can receive local signals via satellite obviously does not need “life-line network television service.” Accordingly, those markets where local-into-local service is available from at least one satellite carrier do not contain any truly “unserved households.” Allowing any household in such a market to receive distant network programming is an unwarranted infringement on the copyrights held by local stations. Such an infringement is contrary to the principles of localism embodied in SHVIA.

D. Consumer Expectations Regarding The Picture Quality Of Free, Analog, Over-The-Air Signals Have Not Changed

In the *Notice*, the Commission inquires whether there have been developments in “picture quality expectations that would warrant a significant modification to the planning factors on which the current Grade B standard for household eligibility for distant television network signal reception

³¹(...continued)
index.asp>.

³² Conference Report, 145 CONG. REC. H11793 (emphasis added).

under SHVA [sic] is based.”³³ The Grade B standard is an objective proxy developed by the Commission for measuring picture quality. The Commission specifically developed the standard to reflect what it considered to be an acceptable over-the-air picture. In formulating the Grade B standard, the Commission determined that, among its planning factors, a signal-to-noise ratio of 30 dB was sufficient to provide a picture of acceptable quality.³⁴ Subsequently, this 30 dB figure was confirmed by the Television Allocation Study Organization (“TASO”) in the late 1950s.³⁵ TASO conducted television viewer tests in which a large number of observers rated picture quality. As a result of these tests, it was determined that a signal of Grade B intensity “is of acceptable quality” and that “[i]nterference is not objectionable.”³⁶

As the Commission acknowledges, there have been no reliable studies subsequent to the TASO study documenting a change in viewer expectations of picture quality with respect to free, analog, over-the-air signals.³⁷ The *Notice* correctly observes that “no current study documents this purported change or replicates the methodology of the initial TASO study that correlated viewer

³³ *Notice* at ¶ 11.

³⁴ See Joint Comments of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations, CS Docket No. 98-201 (filed Dec. 11, 1998), at 37.

³⁵ In fact, the TASO study concluded that a signal-to-noise ratio of 27.5 dB was sufficient for an “acceptable” picture. The Commission rounded this figure up to 30 dB when it created the Grade B levels. Accordingly, the current Grade B values actually overstate the necessary signal strength by more than 2 dB. See IITRI Engineering Statement at 6-7.

³⁶ See Joint Comments of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations, CS Docket 98-201 (filed Dec. 11, 1998), at 37.

³⁷ *Notice* at ¶ 14.

judgments of television picture quality with specific signal levels.”³⁸ Thus, any argument that viewers are dissatisfied with the quality of the picture resulting from a signal of Grade B intensity is pure conjecture. The Commission should not disavow the well-researched and documented TASO study in favor of unsupported theories about viewer expectations.

In determining the appropriate Grade B values, the Commission must not conflate viewer expectations regarding the picture quality of a *pay* television service such as satellite or cable with expectations regarding the quality of a *free*, analog, over-the-air signal.³⁹ Consumers who *pay* for their TV service may—and, indeed, should—expect to receive a picture quality that is better than what they receive for free. It would be patently unfair to impose a higher standard on broadcasters who provide their signals for free, and there is no evidence that consumer expectations regarding free, analog, over-the-air service have changed.

In its *Notice*, the Commission refers to a 1992 study conducted by Bronwen Lindsay Jones titled “Subjective Assessment of Cable Impairments on Television Picture Quality.”⁴⁰ This study, however, is inapplicable for three reasons. First, as the Commission has recognized, these tests “were conducted by cable television sponsors using as subjects viewers who may have expected to receive, and to pay for, higher quality pictures.”⁴¹ A study regarding the quality of picture that viewers expect from a pay television service is not relevant to the determination of what constitutes

³⁸ *Id.*

³⁹ See *id.* at ¶ 15 (inquiring if the test for whether a household is unserved over-the-air should be whether the over-the-air reception is comparable to that received by satellite).

⁴⁰ See *id.* at ¶ 14.

⁴¹ *Id.*

an "acceptable" picture received over-the-air for free.

Second, the results of Jones's study are fatally skewed because the study was conducted on an entirely different scale than the TASO study. All signal-to-noise ratios below 36 dB were excluded from the Jones study. The study participants, of course, gave the lowest rating to the weakest signal used in the study. As Jones noted,

subjects work within the boundaries of scales and tend to use the whole scale, regardless of fit. . . . Test subjects will take a range which is narrow (i.e., all quite high- or low-quality presentations) and expand it to fit the scale, thereby labeling, for example, good quality signals as "Very Annoying"⁴²

Obviously, since a S/N ratio of 36 dB was the worst signal shown to viewers, it received the worst rating, "very annoying," and the middle rating "slightly annoying"—which is as akin to the TASO scale's Grade 3, "passable" as the CCIR's five-point scale permits—must be given to a S/N ratio substantially higher. A study whose scale *starts* at the S/N ratio that the TASO scale would classify as Grade 2, "fine," the second best category on the TASO scale, cannot meaningfully be compared to the TASO study. As Jones states, "[k]nowledge of this [scale] context effect can be used in the design of subjective tests to influence the outcome."⁴³ In this case, the outcome clearly was influenced by the scale chosen, and it should be seriously questioned whether Jones's design—either consciously or unconsciously—dictated the results *a priori*.

Finally, Jones's study suffers from a number of methodological differences that further renders its comparison with the TASO study fatally suspect, including (1) the use of only 33

⁴² Bronwen Lindsay Jones, *Subjective Assessment of Cable Impairments on Television Picture Quality*, 1992 NCTA Technical Papers, at 7-8.

⁴³ *Id.* at 8.

non-expert viewers⁴⁴ compared with the nearly 200 test subjects TASO used; (2) the use of weighted noise compared with the use of unweighted noise in the TASO study; (3) the use of viewing distances closer than the 10-foot viewing distance used in the TASO study,⁴⁵ which Jones acknowledged were also closer than the average viewing distance in the United States⁴⁶ and which necessarily permit greater visual acuity of impairments, as Jones further acknowledged⁴⁷; and (4) the use of relatively high-end television receivers,⁴⁸ larger than those used in the TASO study, which would render impairments more noticeable both vis-à-vis a typical or average receiver and vis-à-vis the smaller 21-inch receivers used in the TASO study. Moreover, the use of only still images,⁴⁹ vis-à-vis moving images, also permits random noise to be more easily perceived and therefore does not faithfully duplicate what it is that home viewers actually watch.

For these reasons, the Jones study does not demonstrate an increase in viewer expectations of picture quality for free, analog, over-the-air broadcast television, and, in fact, Network Affiliates are unaware of any scientifically-valid study that is meaningfully comparable to the TASO study that demonstrates an increase in consumer expectations.

⁴⁴ See *id.* at 3.

⁴⁵ See *id.* at 9.

⁴⁶ See *id.* at 2.

⁴⁷ See *id.* at 7.

⁴⁸ See *id.* at 5 (describing the 27-inch JVC receiver as “high-quality”); *id.* at 2 (describing the 32-inch Sony Triniton receiver as “high-end”).

⁴⁹ See *id.* at 3.

E. By Adding The Word "Stationary," Congress Did Not Alter The Unserved Household Definition

SHVIA defines an "unserved household" as one that "cannot receive, through the use of a conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network station affiliated with the network of Grade B intensity."⁵⁰ In its *Notice*, the Commission suggests that by adding the word "stationary," Congress intended to change the current assumption that, in measuring signal strength, the receiving antenna must be properly oriented toward the desired station.⁵¹ This suggestion is incorrect. By inserting the word "stationary," Congress intended only to specify that signal strength measurements should not be taken using the mobile run methodology.

It has always been presumed that when measuring signal intensity the receiver must be oriented towards the transmitter. As the Commission has stated, the "standard methodology for signal strength measurement . . . requires that the test antenna be oriented so that it is most likely able to measure the signal at the *best* available strength."⁵² That Congress did not intend to alter this "standard methodology" is abundantly clear from SHVIA's legislative history. On passing SHVIA, Senator Hatch, Chairman of the Conference Committee and the Senate Judiciary Committee, specifically stated:

I would clarify one other point relating to a minor modification we made to the definition of "unserved household" in the distant signal satellite statutory license found in section 119 of Title 17 of the United States Code. The conferees decided to add the word "stationary" to the phrase "conventional outdoor rooftop receiving antenna" in Section 119(d)(10) of the Copyright Act. As the Chairman of the Conference Committee

⁵⁰ 17 U.S.C. § 119(a)(10)(A), as amended by SHVIA § 1005(a).

⁵¹ See *Notice* at ¶ 18.

⁵² *In re Jay Lubliner and Deborah Galvin*, Potomac, Maryland, FCC 98-201 (released Aug. 21, 1998), at ¶ 16 (emphasis added).

and of the Senate Judiciary Committee, which has jurisdiction over copyright matters, I should make clear that this change should not require any alteration in the methods used by the courts to enforce the "unserved household" limitation of Section 119. *The new language states only that the antenna is to be "stationary"; it does not state that the antenna is to be misoriented (i.e., pointed away from the station in question).* Any interpretation that assumed misorientation would be inconsistent with the basic premise of the definition of "unserved household," which defines that term in relation to an individual TV station rather than to all network affiliates in a market—and speaks to whether a household "cannot" receive a Grade B intensity signal from a particular station. If a household can receive a signal of Grade B intensity with a properly oriented stationary conventional antenna, it is not "unserved" within the meaning of Section 119. In addition, if station towers are located in different directions, conventional over-the-air antennas can be designed so as to point towards the different towers without requiring the antenna to be moved. And reading the definition of "unserved household" to assume misoriented antennas would mean that the "unserved household" limitation had no fixed meaning, since there are countless different ways in which an antenna can be misoriented, but only one way to be correctly oriented, as the Commission's rules make clear.⁵³

The sentiments of Senator Hatch were echoed by Senator Patrick Leahy, who clarified that "[t]he new language says only that the antenna is to be 'stationary,' *it does not say that the antenna is to be improperly oriented, that is pointed in a way that does not obtain the strongest signal.*"⁵⁴ Similarly, Congressman Howard Coble, the original sponsor of SHVIA, further clarified:

I want to stress that this one-word change to the Copyright Act does not require (or even permit) any change in the methods used by the courts to enforce the "unserved household" limitation of Section 119. The new language says only that the test is whether a "stationary" antenna can pick up a Grade B intensity signal; although some may have wished otherwise, *it does not say that the antenna is to be improperly oriented*

⁵³ 145 CONG. REC. S14991 (daily ed. Nov. 19, 1999) (statement of Sen. Hatch) (emphasis added).

⁵⁴ 145 CONG. REC. S14991 (daily ed. Nov. 19, 1999) (statement of Sen. Leahy) (emphasis added).

*(i.e., pointed away from the TV transmitter in question). To read the Act in that way would be extraordinarily hypocritical, since "stationary" satellite antennas themselves must be perfectly oriented to get any reception at all."*⁵⁵

In light of the unambiguous legislative history regarding the addition of the term "stationary," any suggestion that the presumption of a properly oriented antenna has changed is utterly false.

F. The Grade B Planning Factors Should Not Be Revised

As shown in the attached Engineering Statement prepared by ITT Research Institute, Center for Electromagnetic Science, the Grade B planning factors used by the Commission are still accurate today. In fact, if the Grade B signal intensity standard is to be revised at all, it should be adjusted downward, not upward.⁵⁶ Moreover, there is no need for the Commission to adjust the Grade B standard to somehow account for ghosting. Ghosting at a particular location is dependent on numerous variables including weather, time of year for areas with deciduous trees, wind, and even moving vehicles and aircraft, so its presence cannot be predicted with any accuracy. In addition, technical solutions already exist to eliminate the impact of ghosting. The fact that this technology is not currently used in the industry demonstrates that consumers do not view ghosting as a major problem. Accordingly, there is no need to modify the Grade B standard to account for ghosting.

⁵⁵ 145 CONG. REC. H12814 (daily ed. Nov. 18, 1999) (statement of Rep. Coble).

⁵⁶ See Joint Reply Comments of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations, CS Docket No. 98-201 (filed Dec. 21, 1998), at 6-25.

**IV.
Creation Of A New Grade B Standard For
Digital TV Would Be Premature**

At this time, it is not appropriate for the Commission to recommend whether a separate Grade B standard should be used for determining if a digital television ("DTV") viewer is eligible to receive satellite transmissions of distant network signals under SIFVIA.⁵⁷ In contrast with the universal nature of analog television, digital television sets are still rare. The transition from analog to digital transmission of programming will not be complete until the year 2006 at the earliest. Even if this deadline for the return of analog spectrum licenses is not pushed back, an assumption that seems unlikely given the current price of digital television sets and concerns over various standards, U.S. households will continue to receive analog programming for at least six more years. Accordingly, as a practical matter, there is currently no need to determine whether a household is "unserved" with respect to over-the-air digital signals.

As a policy matter, the Commission should not attempt to define a digital Grade B standard prematurely. In the next six years, changes in the marketplace could eliminate the need for an "unserved household" definition. For example, if local-into-local satellite delivery continues to spread at its current pace, all households could have access to local network programming by the year 2006. In that case, a Section 119 license would no longer be necessary. Moreover, it is possible that broadcasters and satellite carriers could come to a mutual agreement regarding retransmission of distant signals to white areas. If the Commission steps in prematurely to regulate this matter, it will foreclose the possibility of such a market-based solution. Accordingly, the Commission should decline to recommend to

⁵⁷ See 47 U.S.C. § 339(c) (directing the Commission "if appropriate" to "make a further recommendation relating to an appropriate standard for digital signals"); *Notice* at ¶ 30.

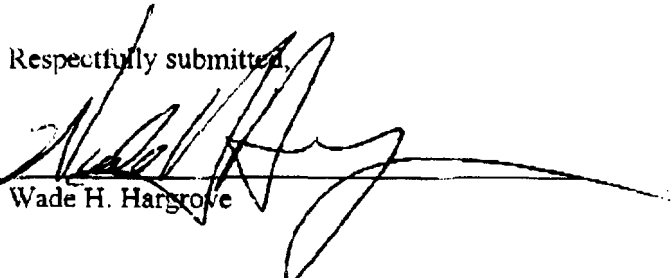
Congress any "unserved household" definition with respect to digital signals at this time.

IV. Conclusion

In considering whether to recommend changes in its longstanding definition of Grade B signal intensity for purposes of SHVIA, the Commission must keep in mind two overriding principles: (1) that localism must be protected, which is a central tenet of SHVIA, and (2) that a compulsory copyright license must be narrowly construed. In light of these overarching principles, it is clear that the Commission should not recommend any changes to its well-established Grade B signal intensity standard. The current Grade B standard has been repeatedly reviewed by the Commission, and each time, including as recently as last year, the Commission has reaffirmed the accuracy of this standard. There is no evidence that the Grade B standard has been rendered out-of-date due to changes in technology or viewer expectations. In fact, if the standard is to be revised at all, the signal intensity values should be lowered, not raised. In any event, the determination of which households are "unserved" has become less important because today a greater percentage of households than ever before is served by local stations. Due to increased numbers of television stations and improvements in transmission and receiver technology, more homes than ever can receive their local stations over-the-air. In addition, more than half of the country's population lives in markets where satellite carriers already offer local signals and, thus, have very convenient access to local programming. As local-into-local service spreads, the compulsory license granted by Section 119 will no longer be necessary. Therefore, Network Affiliates urge the Commission to recommend to Congress that no changes be made to its longstanding, time-tested Grade B signal intensity standard.

Respectfully submitted,

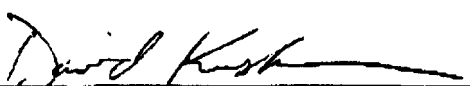
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June 27, 2000